Pepsi-Cola Company *and* Local 125, International Brotherhood of Teamsters, AFL–CIO. Case 22–CA–21941

January 10, 2000

DECISION AND ORDER REMANDING PROCEEDING

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On April 15, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to remand this case to the administrative law judge for additional findings and further consideration as set forth below.

The judge found, in agreement with the General Counsel, that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending and discharging employee Sean Reilly because of his protected activity. The Respondent contends that Reilly, a shop steward, was fired for calling for a work stoppage in violation of the collective-bargaining agreement.

The facts, more fully set forth in the judge's decision, are as follows: On March 7, 1997,[1] employee Sean Reilly, a shop steward at the Respondent's Piscataway facility, held a union meeting in a conference room located inside the plant. Over 80 employees attended. During the meeting, loud statements were made concerning attendance at the Respondent's annual Right Side Up meeting[2] scheduled for March 10. Reilly testified that some employees urged a boycott of the meeting, while others stated they wanted to attend. Reilly further testified that he remained neutral on the issue during this meeting and that he did not direct any employees not to attend. Throughout the meeting, Reilly was located at the far end of the conference room about 50 feet away from an adjoining copy room.

About 5:45 a.m. that same morning, Vaughan Dickinson, the Respondent's product manager, went to the copy room and heard several statements coming from the union meeting indicating that employees were being urged to boycott the Right Side Up meeting. Dickinson testified that he heard a voice he recognized as Reilly's yelling, "I don't care if they fire me or sue me, there's no good reason to go to the meeting on Monday unless you have an attendance issue," and, "We need to take action now, not five years from now. We need unity."

At this point, Dickinson left the copy room to inform the Respondent's unit manager, Bryan Semple, of what was happening. When Dickinson could not find Semple, he returned to the copy room and allegedly heard Reilly telling employees to call in sick so they would not get in trouble, and warning employees that the Union would be watching to see who attended the meeting. Dickinson then left the copy room to intervene, but the topic changed to a pending union grievance as he reached the door of the conference room.

The Respondent made arrangements to interview Reilly later that day. Reilly requested union representation, but had problems obtaining the cooperation of union officials to represent him at the meeting. The Respondent then suspended Reilly pending an investigation.

On March 11, the Respondent interviewed seven employees about the statements attributed to Reilly by Dickinson. Many employees refused to answer some or all of the Respondent's questions, and the ones who did answer either denied Reilly made the statements or stated they did not know if he made them. The Respondent also interviewed Reilly that day, and he denied having made any statements calling for a boycott of the Right Side Up meeting.

Thereafter, the Respondent fired Reilly for violating article 16 of the collective-bargaining agreement which prohibited shop stewards from taking strike action without union authorization.[3]

The judge found, and we agree, that the principles set forth in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964), apply in the instant case.[4] When an employer discharges an employee for misconduct arising out of a protected activity, under *Burnup & Sims* the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. Id. at 23. Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Rubin Bros. Footwear, Inc.,* 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953).

[1] All dates hereinafter are 1997 unless otherwise indicated.

[2] At this annual meeting, the Respondent reviews with employees the past year and discusses the upcoming year's plans and procedures. The Respondent considers this meeting to be very important and attendance is mandatory. In his decision, the judge erroneously referred to this meeting as the "Upside Down" meeting.

[3] Art. 16 states, in pertinent part:

> Shop Stewards and alternatives have no authority to take strike action, or any other action interrupting the Company's business, except as authorized by official action of the Union.
>
> The Company recognizes these limitations upon the authority of Shop Stewards and their alternatives, and shall not hold the Union liable for any unauthorized acts. The Company in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the Shop Steward or alternative has taken unauthorized strike action, slowdown, or work stoppage in violation of this agreement.

[4] Although the judge referred to *Burnup & Sims* as a case involving picket line misconduct, that case actually involved two employees who were fired for allegedly making threatening remarks while soliciting another employee to join the union.

The judge began his analysis by finding that Reilly was engaged in protected activity, i.e., holding a union meeting, at the time of the alleged misconduct. The judge next found that Dickinson honestly believed that it was Reilly he overheard calling for a boycott of the Right Side Up meeting. In the very next sentence, however, the judge called into question Dickinson's belief by stating that, in these circumstances, where Dickinson heard the statements through a wall separating the conference room from the copy room,[5] he [the judge] was not persuaded that "a reasonable person could have been all that certain that the remarks heard by Dickinson came from Reilly." In view of these contradictory statements, we are uncertain as to whether the judge found that the Respondent sustained its burden under *Burnup & Sims*.[6] We therefore find it necessary to remand this issue to the judge for an explicit determination of whether the Respondent affirmatively established that it had an honest belief that Reilly made the statements calling for a boycott of the Right Side Up meeting.

We further find that, even assuming the judge's decision could be construed as having found that the Respondent did establish its honest belief defense under *Burnup & Sims*, the judge's analysis does not adequately discuss the next part of the *Burnup & Sims* test, i.e., whether the General Counsel met his burden of demonstrating that Reilly did not, in fact, make the statements attributed to him.[7] The only evidence the General Counsel offered on this point was the testimony of Reilly himself, who denied making the statements attributed to him by Dickinson. The judge did not, however, make a specific credibility finding concerning Reilly's denials. Rather than stating whether he credited Reilly on this point, the judge merely noted the Respondent's contention that Reilly's testimony at trial differed from his testimony in a prior arbitration[8] raised insufficient purported discrepancies "to conclude that the opposite of his [Reilly's] testimony *must* be true." (Emphasis added.)

Because Reilly was the General Counsel's sole witness on this point, the credibility of Reilly's denial was the critical factor for determining whether the General Counsel carried his burden. As noted above, the judge did not make a specific credibility finding concerning this testimony. In the absence of such a credibility finding, we are unable to make a determination as to whether, even assuming the judge found that the Respondent established an honest-belief defense, the General Counsel carried his burden under *Burnup & Sims* of showing that Reilly did not make the statements attributed to him. Accordingly, we also find it necessary to remand this issue to the judge for further findings and analysis, including a determination of the credibility of Reilly's denial.[9]

In sum, we find that the judge's decision does not include the appropriate analysis and findings required under the *Burnup & Sims* test. The judge has not clearly stated: a) whether the Respondent established that it held an honest belief that Reilly engaged in the misconduct attributed to him; and b) if the Respondent did establish that it held such a belief, whether the General Counsel carried his burden of showing that Reilly did not engage in the misconduct. Because such analysis and findings are necessary to determine whether the Respondent has violated the Act, we shall remand this case to the judge for further analysis and findings as indicated herein, and for the issuance of a supplemental decision.[10]

ORDER

It is ordered that this proceeding is remanded to Administrative Law Judge Raymond P. Green for the purposes described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Sec-

[5] The judge also noted that the evidence indicated that, during the meeting, Reilly was standing at the opposite end of the copy room, about 50 feet away.

[6] See *General Telephone Co.*, 251 NLRB 737, 739 (1980), enfd. 672 F.2d 895 (D.C. Cir. 1981) ("establishing an 'honest belief' requires more than the employer's mere assertion that an 'honest belief' of such misconduct was the motivating force behind the meting out of discipline . . . it requires some specificity in the record, linking particular employees to particular allegations of misconduct.").

We further note that the judge did not discuss how, if at all, the Respondent's investigation into the matter should be factored into a determination of whether the Respondent established an honest belief that Reilly called for a boycott of the meeting.

[7] The General Counsel has the burden of proving this fact by a preponderance of the evidence. *Wittek Industries*, 313 NLRB 579 fn. 2 (1993).

[8] We adopt the judge's finding that deferral is not appropriate in this case.

[9] As noted by the judge, the General Counsel failed to call any witnesses to corroborate Reilly's testimony. The absence of corroborating witnesses is, of course, a relevant factor for the judge to consider in his determination of whether Reilly is to be fully credited. *International Automated Machines,* 285 NLRB 1122 (1987), enfd. 861 F.2d 720 (6th Cir. 1988).

[10] Member Hurtgen agrees that this case should be remanded to the judge for credibility determinations and analysis under the *Burnup & Sims* test, set forth herein. Although he agrees with his colleagues that the judge failed to properly apply the test and burdens in *Burnup & Sims*, Member Hurtgen notes that the judge appears to have concluded that the Respondent established that it had a reasonable belief that the Union Steward Reilly engaged in misconduct. Member Hurtgen further notes that it is also arguable that the judge concluded that the evidence was in equipose as to whether Reilly actually engaged in the misconduct. Had the judge clearly reached that conclusion, Member Hurtgen would find that the General Counsel failed its burden under *Burnup & Sims* of establishing that Reilly had not, in fact, engaged in the misconduct. However, because the judge's findings are ambiguous on this point, and because clear credibility determinations were not made, Member Hurtgen agrees that the case should be remanded to the judge for further proceedings consistent with this Decision and Order.

tion 102.46 of the Board's Rules and Regulations shall be applicable.

Tara Levy, Esq., for the General Counsel.
Richard R. Boisseau, Esq. and *G. Paris Sykes Jr., Esq.,* for the Respondent.
James L. Linsey, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on February 17, 1999. The charge and amended charges were filed on March 19, August 8, and November 6, 1997, and the complaint was issued on December 4, 1998. In substance, the complaint alleges:

1. That on or about March 7, 1997, the Respondent, by Vaughan Dickinson, engaged in surveillance of a union meeting.

2. On March 7, 1997, the Respondent suspended Shop Steward Sean Reilly because of his union and protected concerted activity.

3. That on March 17, the Respondent discharged Sean Reilly because of his union and protected concerted activity.

The Respondent denies that it engaged in unlawful surveillance and contends that it suspended and thereafter discharged Reilly because it discovered that he was instigating employees to engage in a work stoppage in contravention of the collective-bargaining agreement's no-strike clause. The Respondent also asserts that this matter should be deferred to arbitration.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Sean Reilly was hired in 1990 and transferred to the Piscataway facility in 1992. He was employed as a bulk customer representative and was, as of March 1996, a shop steward providing first line representation for about 150 sales employees.

The Company and the Union have an established history of collective bargaining and the most recent contract covering the Piscataway and other New Jersey locations was executed in June 1996. This contract contains grievance-and-arbitration provisions and covers in excess of 700 employees. The contract also contains a no-strike clause.

The Respondent asserts that as a consequence of the fact that the contract provided for some give-backs (particularly average wage reductions for customer representatives), the tenor of labor relations has deteriorated in recent years and has become more adversarial in nature. (Pointing for example, to a large increase in the number of arbitration cases.)

Each year the Company sets aside a day for a "Right Side Up" meeting. This is a meeting where management reviews with the employees the past year and discusses the upcoming year's plans and procedures. The 1997 annual meeting was held at the Hilton Hotel in East Brunswick and employee attendance was mandatory. There is no question but that management considers this meeting to be very important.

On March 5, 1997, Reilly conducted a union meeting of the Piscataway sales employees. He testified that at this meeting, some of the employees expressed their displeasure at being required to attend the "Right Side Up" meeting scheduled for March 10. (Some of the more senior employees said that they should boycott the meeting, whereas some of the more junior employees were in favor of getting a day off with pay and food.) As the time was getting short, Reilly adjourned the meeting and when employees asked to discuss this further, another meeting was scheduled for Friday morning, March 7, at 5:30 a.m.

In the meantime, Manager Vaughan Dickinson[2] testified that around March 5, 1997, he began to hear rumors to the effect that some employees wanted to boycott the "Upside Down" meeting.

Having obtained permission to hold a union meeting, Reilly met with over 80 employees in a conference room located on the company's premises. The meeting did not commence until about 5:45 a.m. as he waited for employees to show up. It was held in a walled off area which was quite large. According to Reilly, there commenced a loud and vociferous debate about the upcoming "Right Side Up" meeting, with several employees urging that the entire group refuse to attend. On the other hand, he testified that other employees wanted to attend the meeting. For his own part, Reilly testified that he remained neutral on the question and did not urge, direct, or solicit any employees to refuse to go to the meeting. He testified that his position in the room was at the far end, away from the adjoining copy room.

Dickinson arrived at work on March 7, at about 4:45 a.m. and made his rounds of the facility. According to Dickinson, when, at 5:45 a.m., he arrived at the copy room, he overheard a commotion in the adjoining room where the union meeting was in progress. Dickinson testified that as the talk was loud enough to go through the wall, he stopped to listen when he heard statements indicating that employees were being urged to boycott the "Right Side Up" meeting. He testified that he heard Reilly yelling in an "intimidating and threatening" manner and that he specifically heard Reilly stating that unless an employee had an attendance problem; "I don't care if they fire me or sue me, there's no good reason to go to the meeting on Monday." According to Dickinson, he overheard Reilly saying that "we need action now," and that "we need unity." He states that when he heard additional statements indicating the possibility of a boycott he left the copy room in order to inform Unit Manager Bryan Semple about what was going on.

According to Dickinson, he couldn't find Semple and so, after a few minutes, he went back to the copy room to find out what else was being said about a boycott. He states that he heard Reilly say that the employees should call in sick so that they wouldn't get into trouble. Dickinson also claims that he heard Reilly say that the Union would keep track of any employees who attended the "Right Side Up" meeting and that

[1] The parties agreed to incorporate the record made in the arbitration proceedings.

[2] At that time, Dickinson was the product availability manager at Piscataway. At the time of the hearing, he had been promoted to another job at a different location.

those who did could be called up before the Union's "E-Board." (Executive Board?) At this point, according to Dickinson, the topic changed to a discussion about a pending grievance and he then left the copy room.

As testified to by Reilly, there is no question but that some of the employees at the March 7 meeting strongly urged, in loud voices, that all refuse to attend the "Right Side Up" meeting. Therefore, as Dickinson happened to be in the copy room and without intending to do so, happened to overhear remarks leading him to believe that some of the employees were thinking of engaging in a work stoppage prohibited under the terms of the contract's no-strike clause, it would not be unreasonable for him to remain for a short time and listen for evidence about a potential breach of the contract. Under such circumstances, I do not believe that this single incident of "surveillance," should be considered to be a violation of the National Labor Relations Act. *Roadway Express*, 271 NLRB 1238 (1984), *Ordman's Park & Shop*, 292 NLRB 953, 956 (1989).

At the conclusion of the meeting, Brian Semple, after receiving a verbal report from Dickinson, asked Reilly what had happened and Reilly said that it was none of his business. According to Reilly, when Semple insisted on knowing what had happened, he replied that all the employees were going to attend the "Right Side Up" meeting if that was what Semple wanted to know. Later in the morning, Reilly received a call from Union Representatives Bernie Milazzo and John Schepis who said that they had gotten a call from the Employer's human resources supervisor who told them that he heard that Reilly had instructed employees not to go to the "Right Side Up" meeting. Reilly states that he responded that some of the people were going crazy at the meeting, but that he had told them that the "Right Side Up" meeting was mandatory and that they had to attend. After that call, Milazzo and Schepis agreed to encourage the employees to attend the "Right Side Up" meeting.

At about 2:30 p.m., Reilly was called into the office by Human Resources Managers Nan Shea and Ann Schuster and was questioned about what happened at the union meeting that morning. At this point, Reilly asked to be represented by a union officer and he was told that he was being suspended pending investigation. He then was escorted out of the building.

The Employer's stated reason for suspending Reilly on March 7 was for "strike action" in violation of article 16 of the collective-bargaining agreement. Article 16 states, in pertinent part;

> Shop Stewards and alternates have no authority to take strike action, or any other action interrupting the Company's business, except as authorized by official action of the Union.
>
> The Company recognizes these limitations upon the authority of Shop Stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Company in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, In the event the Shop Steward or alternate has taken unauthorized strike action, slowdown, or work stoppage in violation of this Agreement.

As it turned out, the "Upside Down" meeting was held as planned, on March 10 and attendance was at a normal level. Prior to the meeting, the Union's officers made efforts to contact its members and urge them to attend the meeting.

The Respondent conducted an investigation in an attempt to determine the facts of the matter. By arrangement with the Union, a group of seven employees were interviewed with union representatives present. The Employer's representatives had a list of 14 questions designed to determine whether Reilly or anyone else at the March 7 meeting urged a boycott of the "Upside Down" meeting. These interviews were held on March 11, 1997, and the employees who agreed to answer the questions (some apparently refused to answer all or some of the questions), either denied that Reilly made the alleged statements or stated that they did not know if he made them. Some suggested that others were responsible for the statements.

Reilly was also interviewed on March 11 and he stated that he did not make any of the statements on the employer's question list.

Determining that neither Reilly nor the Union proved that Reilly did not make the statements attributed to him by Dickinson, a decision was made to discharge him for violating article 16 of the contract.

III. ANALYSIS

A. Deferral to Arbitration

On March 11, 1997, Reilly filed a grievance and on March 19, 1997, the Union filed the instant unfair labor practice charge. On February 27, 1998, the Board's Regional Director issued a letter to the parties indicating that he would, pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971), defer further processing of the charge to arbitration.

At the arbitration hearing, evidence on the merits of Reilly's suspension and discharge was presented by both sides and, as noted above, the transcript and exhibits of that hearing were incorporated into the present record. Nevertheless, the Respondent argued and the arbitrator agreed that because the grievance was not signed by the grievant, it was fatally defective under the terms of the collective-bargaining agreement. The arbitrator therefore rejected the grievance on this procedural ground, notwithstanding the fact that she was aware that there was an outstanding unfair labor practice case, which was being deferred to arbitration.

By letter dated October 23, 1998, the Regional Office notified the Employer that because the arbitrator had refused to decide the matter on the merits, it would proceed with the unfair labor practice case, unless the Employer requested, within 15 days, that the arbitrator reconsider her decision and decide the case on the merits. This, the Employer did on November 16, 1998, but when the Union did not agree to have the arbitrator reconsider her decision, the arbitrator refused to do so. When that happened, the Regional Director issued the instant complaint so that the matter would finally be heard on its merits.

In *Collyer*, supra, the Board established a policy that if an arguably meritorious unfair labor practice charge was filed in a context where there existed a collective-bargaining agreement containing an arbitration clause, then the Board would compel the charging party, in the absence of evidence showing a conflict of interest or other evidence warranting a conclusion that the arbitration process would be unfair, to take the matter to arbitration even if it did not want to do so. After a decision was rendered by the arbitrator, the Regional Director could then

review the award under the standards of *Spielberg Mfg. Co*., 112 NLRB 1080 (1955).[3]

There is nothing in the statute that compels the Board to defer its own proceedings to arbitration; this policy clearly being a matter of discretion. *Collyer Insulated Wire*, supra at 840, *Hallmor, Inc*., 327 NLRB No. 61 (1998). Moreover, the entire deferral policy is premised on the assumption that if deferred, the arbitrator will hear and decide the merits of the dispute. Thus, the Board has stated that it will not defer a matter to arbitration unless the Respondent agrees to waive the procedural question regarding whether the grievance was timely filed. *United Technologies Corp*., 268 NLRB 557, 560 fn. 22 (1984).

In the present case, the Respondent prevailed upon the arbitrator to decide the arbitration case on a procedural ground and not on the merits of the dispute. Therefore, as the arbitration never made a decision on the merits, her decision cannot be the basis of deferral. While it is true that that the Respondent did ultimately ask the arbitrator to reconsider the matter and to decide the case on the merits (after the Region indicated that it was going to issue a complaint), the arbitrator refused to do so. In my opinion, once the arbitrator refused to consider the case on the merits it was at best, no longer efficient and at worst, fruitless to have the matter resubmitted to her for further findings. In my opinion, one bite at the arbitration apple is enough and the Company, having taken the tack of having the dispute dismissed at the arbitration level on procedural grounds, should no longer have the option of forcing the Union into further delays by having a potentially viable statutory claim (the unfair labor practice charge), wait upon its resubmission to the arbitrator.

B. The Merits

As a factual question, this case boils down to whether it was Reilly who made the statements at the March 7 union meeting, which amounted to a call for a partial work stoppage. On one hand, we have Dickinson, who asserts that while at the copy machine, he could hear, through a wall, that it was Reilly who made such statements. On the other hand, we have Reilly who asserts that although there were people in the room who did urge members to boycott the "Upside Down"meeting, it was not he who did so.

Despite the fact that there were over 80 other potential witnesses, neither the General Counsel, the Union, nor the Company presented, either in the arbitration case, or in the matter before me, any other persons to testify as to who said what at the March 7 meeting.

The Company's position on the merits is that if Reilly, on March 7, 1997, urged the employees to boycott the "Upside Down" meeting, this was tantamount to strike action under the terms of article 16 of the contract, and that pursuant to the explicit terms of that clause, Reilly was subject to discharge. Likewise, the Company argues that if Reilly's actions and statements at the meeting are construed as a call for an unauthorized strike in breach of the contract's no-strike clause, such action is not protected under the National Labor Relations Act and he may legitimately be discharged for such conduct.

This is a case where Reilly was engaged in union/protected activity at the time that he allegedly made the offensive remarks. Therefore, I think the General Counsel is correct in applying the principles of *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964). In that case, the employer disciplined an employee for misconduct it reasonably believed was engaged in at a picket line. In such circumstance, the Court held that the employer may defend its disciplinary action by showing that it had an honest belief that the employee engaged in serious misconduct. The Court also held, however, that the General Counsel may overcome that defense if he shows that the employee did not, in fact, engage in the alleged misconduct. See also *Beaird Industries,* 311 NLRB 768, 769 fn. 7 (1993).

I have no doubt that Dickinson overheard remarks on the morning of March 7, which could reasonably be construed as calling for a boycott of the "Upside Down" meeting. I also think that he honestly believed that such remarks were made by Reilly. But I am not persuaded that a reasonable person could have been all that certain that the remarks heard by Dickinson came from Reilly. Dickinson heard them through a wall separating the conference room from the copy room and the evidence indicates that Reilly was standing at the opposite end of the room, about 50 feet away. I also note that Dickinson did not overhear the entire meeting and that he did not see any of the speakers.

Reilly denied that he made the remarks attributed to him by Dickinson and testified that others at the meeting urged that the employees boycott the "Upside Down"meeting. His testimony was that this was a boisterous and loud meeting and that before its end, he told the employees that they had to go to the "Upside Down" meeting. Although the Respondent contends that Reilly's testimony at this hearing was substantially different from that in the arbitration hearing or during the company's interview of him on March 11, I do not believe that these purported discrepancies amount to all that much and are not sufficient to conclude that the opposite of his testimony must be true.

The Respondent makes a big point of the fact that neither the General Counsel nor the Charging Party presented any witnesses to corroborate Reilly's testimony as to what took place at the March 7 meeting. Given the fact that there were over 80 union members present at that meeting, I can only wonder why they did not choose to present at least one corroborating witness. Nevertheless, these people, all of whom were employed by the company, were also available as potential witnesses to the Respondent, which was free, within the parameters of *Johnnies' Poultry Co*., 146 NLRB 770 (1964), enfd. denied 334 F.2d 617 (8th Cir. 1965), to have its representatives interview these employees in preparation for this trial and to compel their attendance by use of subpoenas.[4] Therefore, in the context of this case, the nontestimony of corroborating witnesses seems to me to present a standoff.

The lack of any corroborating witnesses presents me with the prospect of having to make a difficult decision about what should have been a relatively simple matter to decide.

On balance, I conclude that Dickinson had an honest belief that Reilly, during the course of a protected union meeting,

[3] In *Spielberg Mfg. Co,* the Board held that where an arbitrator has ruled on a dispute that is coextensive with allegations of the charge, the Board will dismiss the unfair labor practice allegation assuming that the arbitrator's findings are fair and regular and that the arbitrator considered the unfair labor practice aspects of the case and did not misapply Board law.

[4] For a discussion of *Johnnies Poultry* and later cases, see the *Developing Labor Law*, Third Edition, Chapter 6 at 126 and 127.

made statements which could be construed as calling for a work stoppage. On the other hand, although honestly held, his belief that it was Reilly who made these statements seems to be to de facto uncertain, given the particular circumstance in which Dickinson heard them. As such, it is my opinion, that the General Counsel has presented credible evidence, sufficient to overcome the Respondent's honest belief defense. Accordingly, I conclude that by suspending and thereafter discharging Reilly, the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By suspending and discharging Sean Reilly because of his activities on behalf of Local 125, International Brotherhood of Teamsters, AFL–CIO, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. The Respondent has not violated the Act in any other manner alleged in the complaint.

3. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged Sean Reilly, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of his suspension to date of his reinstatement or a valid reinstatement offer, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Pepsi-Cola Company, Piscataway, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or discharging any employee because of their membership in or activities on behalf of Local 125, International Brotherhood of Teamsters, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Sean Reilly, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Sean Reilly and within 3 days thereafter notify him in writing that this has been done and that the suspension and/or discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Piscataway, New Jersey, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in union or concerted activity for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, within 14 days from the date of the Board's Order, offer Sean Reilly immediate and full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL, make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Sean Reilly and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that such disciplinary actions will not be used against him in any way.

PEPSI-COLA COMPANY